Supreme Court, U.S.
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85-1302
No. A-489

In the
Supreme Court of the United States

October Term, 1985

MARSHALL C. SPIEGEL,

Petitioner,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK and LEONARD A. NELSON,

Respondents.

SUPPLEMENT TO APPENDIX FOR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

Kenneth K. Ditkowsky
Ditkowsky & Contoreb
2626 W. Touhy
Chicago, IL 60645
764-3421
Counsel for Petitioner

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Third Division Filed 4-10-85

No. 84-2290

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CONTINENTAL ILLINOIS NATIONAL BANK,
Plaintiff-Appellee,

v.

MARSHALL C. SPIEGEL,
Defendant-Appellant.

Appeal From The Circuit Court Of Cook County
Honorable REGINALD HOLZER, *Presiding*

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Marshall C. Spiegel appeals from an order of the trial court awarding Leonard A. Nelson fees and costs in the amount of $3,641. The award was granted for Nelson's services as trustee and attorney representing the interests of the unborn beneficiaries of the Oscar Spiegel Insurance Trust. Marshall Spiegel is the sole beneficiary of the trust.

This is the second appeal arising out of this cause of action. The original controversy concerned the beneficiary's exercise of his right to remove Continental Illinois National Bank of Chicago as a co-trustee. At the same time, the beneficiary announced that he would act as sole trustee and requested Continental to turn the assets over to him. Continental refused to make the transfer on the ground that the beneficiary was obligated by the terms of the trust to appoint a successor corporate trustee to whom Continental would transfer the assets. The trial court appointed a trustee/attorney for the unborn beneficiaries and later appointed Nelson as a successor trustee/attorney to represent those interests. The trial court subsequently ruled that under the trust agreement a corporate trustee is required and that removal of a cor-

porate trustee was effective only upon the beneficiary's appointment of a qualified successor corporate trustee. The trial court also awarded Nelson's predecessor as attorney/trustee of the unborn heirs fees and costs in the amount of $4,787.50. The beneficiary appealed both orders, challenging, among other things, propriety of the appointment of Nelson and his predecessor as attorney and trustee for the unknown heirs. On September 7, 1983, in a Rule 23 order, 82-2834, we affirmed the holdings of the trial court.

Subsequent to the appeal, the beneficiary appointed the First National Bank of Highland Park as a co-trustee of the trust. Thereafter, Nelson filed a supplemental petition for fee and costs incurred in the appeal. The trial court granted Nelson's petition, and the beneficiary again appeals.

The beneficiary initially contends that Nelson's appointment by the trial court was improper. He argues that since the trust agreement mandated the appointment of a corporate trustee, the trial court was compelled to appoint a corporate trustee to represent the interests of the unborn beneficiaries.

In our earlier decision, we disposed of the issue of the propriety of Nelson's appointment adversely to the beneficiary. There, we stated:

> "We find the beneficiary's argument that the court's appointment of a trustee for unborn contingent beneficiaries was improper and unnecessary to be without merit. When it appears that 'any person or persons not in being are or may become entitled to * * * any future interest * * * in any property, real or personal, involved in such suit,' the trial court is authorized to appoint a disinterested trustee to represent the interests of such persons in the suit. (Ill. Rev. Stat. 1981, ch. 110, par. 356, now codified as ch. 110, par. 2-501.) Possession and control of the trust assets were very much in issue here, and it was appropriate for the trial court to appoint a disinterested trustee to

represent the interests of unborn contingent beneficiaries."

That holding is the law of the case and we, of course, adhere to it. We also note that the beneficiary's contention that the trial court was constrained to appoint a corporate trustee to represent the contingent beneficiaries because the beneficiary was required by the trust agreement to appoint a corporate co-trustee to be groundless. The trial court derived his power to appoint, not from the trust agreement, but from the statute. The court's appointment of Nelson was proper.

We also find that the trial court's award of fees and costs to Nelson for services rendered on the first appeal was proper.

Under this heading, the beneficiary first argues that Nelson took the same position as Continental throughout the proceedings and thus performed no services for the unborn heirs. The fact that Nelson and Continental agreed on the issues demonstrates no dereliction on his part. Indeed, on all the issues presented to this court, their positions have been upheld.

The beneficiary also maintains that the trial court was not justified in awarding fees without a hearing and testimony as to the value of the services. Nelson supported his petition with an affidavit explaining the services he had rendered and setting forth a list of the hours he had worked. In the first appeal, Nelson filed a brief and presented oral argument to this court. At the hearing on Nelson's petition, the beneficiary did not seek to examine Nelson on his affidavit and made no request to present testimony contrary to Nelson's affidavit. The court's award to Nelson was proper.

Accordingly, the order of the circuit court of Cook County awarding Leonard A. Nelson $3,641 is affirmed.

Order affirmed.

WHITE, P.J., MCNAMARA AND RIZZI, J.J.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

October 2, 1985

Mr. Kenneth K. Ditkowsky
Ditkowsky & Contorer
2626 W. Touhy
Chicago, IL 60645

No. 61869 - Continental Illinois National Bank & Trust Company of Chicago, as a Trustee, etc., et al., respondents, v. Marshall C. Spiegel, Indv., etc., petitioner. Leave to Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 23, 1985.